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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
The Deployment of Wireline Services Offering)	CC Docket No. 98-147
Advanced Telecommunications Capability)	

**COMMENTS OF
RHYTHMS NETCONNECTIONS, INC.**

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**COMMENTS OF
RHYTHMS NETCONNECTIONS, INC.**

Rhythms NetConnections, Inc. ("Rhythms"),¹ by its attorneys, respectfully submits these comments in response to the Commission's August 7, 1998 Notice of Proposed Rulemaking ("NPRM")² in the above-captioned docket.

SUMMARY/INTRODUCTION

Section 706 of the Communications Act³ and the NPRM issued in this proceeding are direct attempts by Congress and the Commission to promote rapid investment in and deployment of advanced telecommunications services throughout America. Underlying this objective is an implicit understanding, by Congress and the Commission, that the pressures of open marketplace competition alone are insufficient to drive advanced services competition in light of the monopoly history of the telecommunications industry. Market imperfections and "market failure," namely the continued monopoly control of the "first mile" of the existing telephone network by

¹ Rhythms is a comprehensive networking solutions company that provides high speed data communications that combine local access through the deployment of xDSL services, with capacity balanced local and wide area networks. Rhythms entered commercial services in San Diego on April 1, 1998 after a two-month test period and is currently building its network and rolling out services in California's Bay Area as well as Los Angeles, Orange County, with plans to expand to more than thirty nationwide markets over the next three years.

² Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188 (rel. August 7, 1998) ("NPRM").

³ 47 U.S.C. § 706.

incumbent local exchange carriers (“LECs”), are successfully resisting significant competitive entry and thus impeding rapid development of high bandwidth services.

Until incumbent LECs are subject to effective local competition, allowing data providers such as Rhythms to offer facilities-based alternatives to the ubiquitous ILEC local networks, there is plainly a need for regulatory intervention regarding interconnection, collocation and access to unbundled network elements (“UNEs”). The NRPM suggests a number of mechanisms for achieving this goal, principally the Commission’s proposal that incumbent LECs establishing independent affiliates may offer advanced services free from the regulatory burdens of Section 251 of the Act,⁴ but that ILECs otherwise must permit unbundling and resale of both their basic copper loops and digital subscriber line (“xDSL”) equipped loops.⁵ NPRM ¶¶ 83-117.

While Rhythms supports both the Commission’s affiliate proposals (*infra* Section III) and its loops and collocation proposals (*infra* Section IV), these comments first focus on two areas of growing importance to xDSL competitors. Section I of the comments addresses the xDSL competitors’ increasing concerns regarding the anticompetitive “spectrum interference” policies currently being invoked by incumbent LECs in order to deny advanced data service competitors access to unbundled loops. To date, incumbents have acted unilaterally and arbitrarily on this issue, making regulatory oversight of uniform, competitively neutral technical standards urgently needed. Slow or insufficient action by the Commission regarding spectrum management issues will certainly result in further delays to the entry of new competitors in the local marketplace.

Section II of the comments addresses the technical and regulatory concerns raised when an incumbent LEC deploys a digital loop carrier (“DLC”) remote terminal in an area where

⁴ 47 U.S.C. § 251.

⁵ See also Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum and Order, CC Docket No. 98-147, FCC 98-188 (rel. August 7, 1998) (“Memorandum and Order”) ¶ 32.

competitors seek to provide xDSL services. This sort of digital local loop transport technology is incompatible with xDSL, and without the Commission actions discussed in the NPRM, the “window of opportunity” for competitive LEC collocation in remoted DLC terminals will close. Rhythms offers several different technical solutions to the question of DLC “vaults,” as well as regulatory steps necessary to implement these solutions. At its core, Section II urges flexibility in handling the technical conflicts that arise from the convergence of network configurations such as digital line carrier vaults and xDSL-equipped lines. Above all, incumbents should be prevented from continuing to wield technical constraints as a unilateral tool to prevent competitive entry for advanced telecommunications services such as xDSL.

DISCUSSION

I. THE COMMISSION MUST END THE INCUMBENT LECs' PRACTICE OF INVOKING ARBITRARY SPECTRUM INTERFERENCE POLICIES TO BLOCK xDSL COMPETITION

With more and more frequency, incumbent LECs are denying access to unbundled loops for the provisioning of xDSL-based services on the grounds that doing so would create "spectrum interference" and violate the incumbents' often inchoate "spectrum management policies." These policies are little more than unilateral declarations employed by incumbents to block competitive access to unbundled loops. Incumbents continue to make internal technology choices without any consideration of how their equipment will interfere with competitors, and then arbitrarily deny access to competitive LECs' based on the CLECs' selection of other (and frequently superior) xDSL technologies. The Commission has devoted a significant part of its NRPM to address whether any truth lies behind the claims of spectrum interference, indicating that it seeks objective technical standards or criteria with which to assess ILEC claims of spectrum interference. NRPM ¶¶ 159-63.

The NRPM inquires about the best way to address loop spectrum issues, specifically seeking comment on "any interference that may result from provision of advanced telecommunications capability using different signal formats on copper pairs in the same bundle." NRPM ¶ 159. Rhythms believes that while the problem of "crosstalk" (*i.e.*, signals from one pair of twisted copper wires generating noise in other pairs within the same binder group) may prove to be an increasingly serious issue in the future, it is currently overstated by the ILECs⁶ and is

⁶ See, e.g., Comments of LCI International Telecom Corp., Petition of SBC for Relief from Regulation, CC Docket No. 98-81 (filed June 24, 1998) at 3 of Appendix D.

largely a red herring by which the incumbents seek to delay and hinder the introduction of xDSL services offered by competitors.

The Commission asks for suggestions on “ways to distinguish between legitimate claims that particular services, technologies, or equipment create spectrum interference and claims raised simply to impede competition,” and for “comment on whether the Commission should adopt any industry standards as the basis for national spectrum management requirements.” NRPM ¶ 160. Rhythms believes that these two questions are in fact closely related in seeking the answer to any actual problems that may be posed by spectral interference.

ILECs have a clear obligation under the Act to make unbundled loops available to competitors. If the ILECs want to establish a countervailing right to refuse to make loops available to competitors based on “spectrum” issues, they must first seek and obtain FCC concurrence that such departures from the Act’s obligations are legitimate and necessary. In turn, the FCC can base such a judgment only on an objective understanding of all relevant technical information drawn from a broad range of providers, manufacturers, and other experts. The Act certainly does not allow ILECs to grant themselves an exemption from its requirements based on their unilateral, often unexplained, unexamined claims of potential technical issues, which is all that ILECs have.⁷

One source of technically objective and competitively neutral guidance on spectrum management issues in the deployment of high-speed data services could be the on-going efforts of ANSI’s T1 Committee. Although the T1 Committee is not currently addressing how copper

⁷ Contrary to ILEC allegations, equipment manufacturers conduct tests on a regular basis to assess the impact of disturbers (other equipment that emits signals that could potentially lead to interference), and represent that their equipment and the services supported perform well even in the presence of numerous disturbers.

plant should be provisioned to avoid spectrum interference, ANSI could certainly assist in this task. The Commission must be careful not to adopt rules that have the effect of stymieing the emergence of true competition based on either one-sided assessments of present-day interference, or based on predicted levels of interference in the future. Nor may the FCC grant ILECs exemptions from the Act's requirements unless and until it is satisfied both as to the technical basis on which it is acting as well as to the competitive implications of its actions.

Rhythms agrees with the NPRM's assumption that consensus, and voluntary industry standards are preferable to Commission-imposed specifications. NPRM ¶ 160. On the other hand, there appears to be a clear need for the Commission to act as the catalyst for this process, for instance by active oversight of the T1 process or the appointment of a federal advisory committee to address spectrum interference standards for advanced services.

Alternatively, the evolution of technically objective and competitively neutral of spectrum management policies can be overseen by a Commission-chartered federal advisory board, modeled after the existing North American Numbering Council. This board could consist of representatives from all facets of the industry concerned with this issue, including incumbents, CLECs, equipment manufacturers, the FCC, and state regulatory bodies. Such a body could

- Oversee or even take over the on-going process of industry standardization analogous to the Commission's Part 68 registration program, for the deployment of xDSL technology using any commercially available modulation scheme
- Report regularly to the Commission on the level of customer complaints being received as a result of spectrum interference;
- Create a standardized means of reporting testing and survey results of spectrum interference levels in individual binder groups or in specific Central Offices;
- Establish an accelerated arbitration framework to rule on CLEC loop requests where the incumbent claims spectrum interference; and

- Enforce either a system of auditing interconnection requests, or a system of allowing CLEC access to facilities to conduct their own testing of specific loop bundles.

This last point merits further examination. Optimally, the Commission itself should adopt comprehensive access rules in the context of collocation and loop availability, in a way that would additionally permit new entrants to inspect and test spectrum interference levels while physically present in ILEC central offices and other facilities. Realistically, however, new entrants, such as Rhythms, are constrained by manpower limitations in their ability to contemplate physically verifying each and every claim of spectrum interference by an incumbent. Instead, a more workable approach may be to require incumbents to submit spectrum interference level reports on all interconnections with xDSL competitors, with a certain percentage randomly selected for audit by the Commission or its technical advisory committee. Whatever solution or set of solutions the Commission chooses to enact, the regulatory regime decided upon must permit consumers the maximum choice of technologies, services, and providers by enabling the marketplace, rather than the incumbents, to determine the appropriate variety and mix of xDSL technologies that can be provided over copper loops.

II. THE COMMISSION MUST ACT NOW IN ORDER TO ENSURE xDSL COMPETITION ON LOOPS RUNNING THROUGH DLC REMOTE “VAULTS”

The Commission asks Commenters to address the technical and regulatory challenges created “when local loops pass through digital loop carriers or similar remote concentration devices.” NPRM ¶ 169. The use of digital loop carrier (“DLC”) technology by incumbent LECs can conflict with the delivery of xDSL-based services because, unless specifically provided for, the two technologies are mutually incompatible. DLC involves the conversion of analog signals traveling along individual copper lines to digital signals traveling across high-speed mediums, often fiber-based. xDSL technologies require the use of continuous “clean” individual copper

lines between the two devices (ATUs) that create the xDSL service. Because the DLC remote terminals or vaults utilized by incumbents interrupt the “clean” path of the xDSL-capable copper loop, the xDSL line must either be “terminated” at the remote terminal with a xDSL ATU, or directed around the DLC vault onto alternative copper lines.

Although the deployment of both xDSL-based services and DLC vaults raises significant technical and regulatory questions, the growing frequency of DLC vaults throughout the existing loop network and the low-cost promise of advanced services over xDSL-based lines require that the Commission, ILECs and competitors take the extra steps necessary to allow both technologies to succeed. Because of the nature of the technical and space limitations issues associated with the use of xDSL lines through DLC vaults, different technical solutions are required for the various network configurations that exist. For that reason the Rhythms urges the Commission to adopt rules that allow an array of technical solutions, including those presented below.

A. Collocation at the DLC Vault

DLC vaults come in a variety of sizes, but are generally no smaller than a big doghouse, and no larger than a small shed. Inside each are one or more equipment racks filled with the line cards necessary to multiplex numerous copper lines carrying analog signals onto larger facilities, such as copper lines or fiber cables, carrying digital signals. Where a DLC vault is sufficiently large to house one or more additional racks, that space can readily be used by a xDSL-based CLEC to collocate at the vault and provide xDSL services on any incoming copper line. That is, much as the incumbent LEC’s DLC vault arrangement accepts “normal” non-xDSL equipped copper lines from the customer premises and combines them into “larger pipes” or “feeder” lines for transport to the central office, so too can a xDSL CLEC accept xDSL functioning copper lines at the DLC vault, and use a modem/multiplexer combination or DSLAM to merge the cop-

per lines onto a more sophisticated transport facility coded for digital signaling. Just like the incumbent, the xDSL provider can employ the available rack space to locate the equipment necessary to translate the incoming copper-based analog signal, in this case configured as an xDSL signal, into a digital, IP protocol to be bundled with other incoming lines for transport to the competitor's presence at the central office and ultimately to its Internet presence.

However, in order to be actually implemented, this technical solution requires several regulatory steps. First, as at the central office, the Commission must require incumbents to identify all DLC vaults where collocation space is available. Where space unavailability is claimed by the ILEC, space diagrams must be provided to the appropriate state commission, and inspections provided to the requesting CLEC. Second, as tentatively concluded by the Commission, NPRM ¶ 175, incumbent LECs must be prohibited from providing collocation space at a DLC vault to its advanced services affiliate unless space has also been made available to competitors. Incumbents must be prohibited from "warehousing" space for future use, particularly by their affiliates. Third, like shared cages in the central office, the Commission should require ILECs to allow shared equipment racks in their DLC vaults. Rack sharing will expand the number of competitors that a given vault will be able to sustain, while lowering collocation costs.

Remote terminal or DLC vault collocation is the most technically straightforward solution to the DLC/xDSL challenge, but requires the most space — a commodity in the control of the incumbents. Just as with physical collocation at the central office, for this solution to work the Commission must enforce national rules that prohibit incumbent LECs from employing their control of the network facilities to discriminate against competitors.

B. Line Card Collocation or DLC Vault Unbundling

In the instances where xDSL-equipped lines enter a DLC vault that is too small for CLEC collocation, or where no room is left for additional collocation, another technically feasible solution exists. It is technically feasible for a competitor to collocate only the line cards or DLC “bolt-on” necessary to terminate the xDSL signal — including converting the analog signal to digital, converting the signal to packets or IP, and multiplexing multiple xDSL copper lines onto one or more T1 lines — on the incumbent’s existing equipment rack. Because the Commission has already determined that it is technically feasible for a CLEC to request T1 level transport from the back of a remote terminal to its presence at the central office, all that is required is an unbundled “port” at the remote terminal by which the newly digitized signal can be transferred to the transport facility. By integrating the CLEC’s line cards directly into the incumbent’s rack this solution drastically reduces the demand on space associated with full collocation. However, line card collocation raises other technical and regulatory concerns.

First, in order for the line card solution to work universally, some industry-wide standards must be set regarding the interface between the line cards and the equipment rack chassis. That is, interface standards are necessary so that CLEC line cards manufactured by various equipment manufacturers will fit into ILEC equipment racks, also made by various suppliers. The Commission should initiate and lead an expedited, industry-wide and competitively neutral process to meet that requirement.

Second, management, security and maintenance issues must be addressed. Generally, the incumbent LEC remotely controls each DLC vault equipment rack by a “management card” located in the rack. In order for all parties to be confident in the performance and security of line

cards sharing a common equipment rack, procedures would have to be established for both shared remote and physical access to the vaults.

Alternatively, it is possible to consider all the facilities in the remote terminal to be owned by the incumbent, including the line cards, and require that the incumbent “unbundle” the equipment necessary to terminate the incoming xDSL line and transport it to the central office. This is a less dynamic approach as an incumbent can only be required to unbundle facilities capable of handling xDSL lines where it employs such facilities. By reserving control of all DLC vault equipment to the incumbent, this variation would simplify some of the security, management and maintenance issues associated with line card collocation, but would be limited in applicability to remote terminals where the incumbent or its affiliate served xDSL lines.

C. Alternative Copper Loops

Another solution to the xDSL/ DLC dilemma, at least in the near-term, is the use of alternate copper loops to “work-around” the DLC vaults. In many cases, incumbent LECs have added DLC vaults to the network as the result of relatively recent customer expansion in a particular geographic area. Still in place are the previously laid copper loops that serviced the area prior to placement of the DLC vault and the running of high bandwidth feeder cable. It is both technically efficient and economically viable for competitors to “bridge” their incoming xDSL-equipped lines around a DLC vault and onto otherwise dormant copper line leading back to the central office. Incumbents regularly provide themselves with this type of facility rearrangement, and in most cases, this “bridge” can be constructed with little or no service quality degradation and minimal cost to either the incumbent or the CLEC.

As with each of the other technical solutions, regulatory steps must be taken to make this a viable option. In particular, the Commission should require that incumbents provide requesting

competitors detailed information regarding alternative copper loop availability and quality. Additionally, the Commission should find that access to existing alternative copper loops from a remote DLC terminal is a necessary component of unbundled loop provisioning. While the alternative copper loop work-around solution is not likely to be available in the long-term, it is an important near-term solution that has been largely rejected to date by incumbents.

D. SubLoop Unbundling

Rhythms disagrees with the Commission that it is necessary to characterize the solutions described above as a form of “sub-loop” unbundling. *Id.* ¶ 174. Mandating CLEC access to the DLC vault is more accurately described as collocation necessary to complete the unbundled loop from the customer premise to the central office that has been interrupted by the incumbent’s DLC vault. However, Rhythms agrees with the Commission’s tentative conclusion that incumbent LECs must provide sub-loop unbundling, as incumbent LECs too often rely on the existing sub-loop unbundling rules as an excuse to not perform technically feasible collocation and UNE unbundling tasks.⁸ Regardless of whether the Commission considers CLEC access to the remote terminal sub-loop unbundling or collocation, technically feasible steps exist to allow xDSL providers to continue to offer their advanced services despite the existence of DLC vaults. Any final rule issued by the Commission with the intent of promoting xDSL must include one or more of the solutions described herein. If not, incumbent LECs will soon realize that simply by proliferating their use of DLC vaults, all xDSL-based competition can be effectively eliminated.

⁸ See, e.g., Comments of OpTel, Inc., In The Matter Of Inquiry Concerning The Deployment Of Advanced Telecommunications Capability To All Americans In A Reasonable And Timely Fashion, And Possible Steps To Accelerate Such Deployment Pursuant To Section 706 Of The Telecommunications Act of 1996., CC Docket No. 98-146 (September 14, 1998) (“706 NOI”) at 7-8.

Because the network configurations and remote terminal sizes differ significantly, a variety of technical alternatives is necessary to guarantee continued competition from xDSL-based competitors. Rhythms agrees with the Commission's tentative conclusion that "competitive LEC[s] [should be allowed to] request any 'technically feasible' method of unbundling the DLC-delivered loop, and the incumbent LEC [must be] obligated to provide the particular method requested." NPRM ¶ 171. Rhythms further supports the Commission's tentative conclusion that "competitive LECs should not be comparatively disadvantaged by incumbent LECs regarding provisioning of DLC-delivered loops." *Id.* ¶ 172.

III. AN AFFILIATE OPTION FOR INCUMBENT LECs WITH PROPER SAFEGUARDS IS A REASONABLE MECHANISM FOR ENCOURAGING THE SPEEDY DEPLOYMENT OF ADVANCED SERVICES

In an effort to encourage the speedy deployment of advanced services, the Commission has proposed to give incumbent LECs an "optional alternative pathway" to provide advanced services, particularly xDSL services: 1) incumbents can provide advanced services themselves subject to the obligations of Section 251(c) of the Act;⁹ or 2) they can offer advanced services through an affiliate, under proper safeguards, but free from Section 251(c) obligations. NPRM ¶ 83. As the Commission has already stated, its proposal to allow incumbents to offer advanced services through affiliates would not require the Commission to forbear from the 251(c) requirements that all incumbent LECs must follow, as the Commission does not have the authority to forbear from 251.¹⁰ Rather, the Commission's proposal creates a scheme under which an affiliate will not qualify as an incumbent in the first place.¹¹ NPRM

⁹ As the Commission indicated, affiliates must still comply with Section 251(a), which contains general duties of telecommunications carriers.

¹⁰ Memorandum and Order ¶¶ 69-79.

¹¹ Under Section 251 (h)(1), an incumbent is "a member of NECA as of the date of the enactment of the 1996 Act, or a 'successor or assign' of such a member." NPRM ¶ 90.

¶ 93. Rhythms applauds the Commission's efforts to find a reasonable mechanism that would encourage the speedy deployment of advanced services, while simultaneously ensuring that incumbent LECs will not use their local market power to marginalize new entrants that are putting their first foot forward with xDSL and other advanced technologies.

In its efforts to create and safeguard a balance between protecting the competitive edge brought by new entrants and providing an alternative pathway for incumbent LECs, the Commission has asked numerous questions on how to craft the parameters of the affiliate option. NPRM ¶¶ 83-117. These questions illustrate the multiple considerations and choices available to the Commission as it sets the rules for the affiliate option, and accordingly, it is imperative that the Commission have a guiding principle that can direct its fashioning of the affiliate relationship.

To ensure that the ILECs' control of the "first mile" does not result in an unfair advantage for incumbents, the guiding principle the Commission should follow is this: the ILEC affiliate must be a CLEC; it must act and be treated in all respects as any other CLEC acts and is treated. As demonstrated previously, the affiliate option can be "a meaningful tool in assuring parity of treatment if the separate subsidiary is required to be a CLEC that functions like any other CLEC, both in terms of certification, and in terms of its relation to the ILECs (including negotiating interconnection agreement[s] and obtaining collocation and UNEs.)"¹² Essentially, the only way the affiliate option can foster a competitive advanced services market that will lead to speedy deployment of services is if the incumbent LEC affiliate has to stand in the shoes of a competitive LEC.

¹² Letter from Jeffrey Blumenfeld, Rhythms NetConnections, Inc., to Kathryn C. Brown, Chief, Common Carrier Bureau, Federal Communications Commission, CC Docket Nos. 98-11, 98-26, 98-32, 98-91, at 1 (filed July 24, 1998) (emphasis added).

The pro-competitive policies of the Act are frequently described as requiring that the ILECs must treat competitors as they treat themselves, or must do for competitors what they do for themselves. Real equality of treatment, though, is better embodied in the principle that the ILECs can only do for themselves what they do for their competitors. The affiliate structure proposed by the Commission has the potential to ensure competitive equality by requiring the ILEC affiliate to be a CLEC, and to thus ensure that all CLECs—including the ILECs' affiliates—be treated the same.

Put another way, where an incumbent's affiliate is held to the treatment by its parent of its competitors, that treatment must improve or the affiliate will suffer equally. It is to this principle that the Commission should return every time it evaluates parameters and safeguards for the affiliate option.

Even though the affiliate option will provide the incumbent LECs with the relaxed conditions that they sought as "incentive" to provide advanced services, the incumbent LECs will invariably resist the implementation of the affiliate option in the hopes of creating a solution that is as close to forbearance as possible. Thus, the Commission should reiterate its previous determination that it does not have the authority to forbear from Section 251 and that incumbent LECs' only alternative to offering advanced services under existing regulation will be the affiliate option.

Of course, the incumbent LECs are likely to argue yet again for the ability to provide xDSL services outside of an affiliate and not subject to Section 251(c), and may even claim that choosing the affiliate option would force incumbent LECs to cut-off services to existing xDSL customers of the incumbent LEC. However, while the notion of incumbents being forced to cut-off xDSL services to existing customers is one the Commission cannot support, it will never

have to. The incumbent LECs can continue to offer xDSL services to existing customers, as they currently do, subject to 251 obligations, while their affiliates simultaneously launch their xDSL services. Once the affiliates' xDSL services are operational, the ILEC may switch its xDSL customers to the affiliate. Any decision to cut-off existing customers would be an ILEC decision alone, and, in a poetic sense, would be an attempt "to cut-off their noses to spite their faces."

The incumbent LECs may also make the misleading argument that safeguards on the affiliate option will compel the ILECs to abandon their intentions to offer advanced services altogether. This is similar to the threats made by Bell Atlantic and other ILECs in their efforts to have their way on their requests for regulatory forbearance. "Bell Atlantic will not deploy ADSL and other advanced technologies quickly and extensively without the relief requested."¹³ Just as it did with the RBOC's forbearance petitions, the Commission should reject this argument as well. In truth, the incumbents have already realized that—despite their efforts to the contrary—new entrants have made significant strides in backbone build-out and xDSL deployment, thus indicating that the advanced services market will continue to be vibrant with or without ILEC participation. Moreover, the incumbents are not able to ignore the revolutionary potential of xDSL-based and other advanced services to overshadow traditional services. Thus, while the incumbents may cry impossibility and threaten abdication, market realities will force them either to offer advanced services through an affiliate option or through an integrated ILEC subject to 251(c). In fact, the incumbent LECs have already indicated as much by their recent efforts to

¹³ Letter from Ray Smith of Bell Atlantic to Susan Ness, Commissioner, Federal Communications Commission, CC Docket No. 98-11 (March 5, 1998) at 2.

tariff their ADSL services as interstate special access services subject to the Commission's authority.¹⁴

Undoubtedly, the incumbent LECs will also oppose many of the safeguards of the affiliate option with the argument that provisioning advanced services in separate affiliates under the Commission's proposed safeguards would destroy the efficiencies that exist when services are provisioned on an integrated basis. To the extent that incumbent LECs rely on this argument, they are admitting that they are providing to themselves artificial advantages not provided to competitors. "Efficiencies" in this context are just another name for "barriers to entry not faced by the incumbent."

It is particularly instructive as to the true state of competition that incumbent LECs cannot imagine a worse alternative to regulation than having to offer services through an affiliate that is treated like a CLEC. In truth, incumbent LECs do not really want their affiliates to face the same battles that competitive LECs have faced during interconnection negotiations. Ever since the 1996 Act, the incumbent LECs have devoted their efforts to crafting and perfecting ways to make competitive LECs' access to the "first mile" unnecessarily cumbersome and artificially inefficient. Understandably, ILECs do not want their affiliates to have to wait their turn for collocation space when space is actually available or can be created. Incumbent LECs do not want affiliates to have their loop requests tied up in the mysterious black hole that is the Bona Fide Request process or turned away under the guise of elusive spectrum management decisions. Incumbent LECs also do not want their affiliates to encounter the ruse of incompatible standards or hear in response to a interconnection request "oh that just can't be done." Finally, incumbent

¹⁴ Bell South Transmittal No. 476 (filed August 18, 1998); GTE Transmittal 1148 (filed May 15, 1998); Pacific Transmittal No. 1986 (filed June 15, 1998).

LECs certainly do not want their affiliates to pay the UNE and collocation prices that competitive LECs have had to pay.¹⁵

Of course, it is precisely because ILECs will not want their affiliates to face these experiences that the Commission must require the ILECs to treat their affiliates just like any other CLEC. If the ILECs, which until now have been ensconced behind the protective walls of dominant market share, want to utilize the affiliate option, their affiliates will have to function in the world that the rest of telecommunications providers have been functioning in until now. Accordingly, the ILECs' affiliates must go through the same certification and interconnection processes that CLECs are currently undergoing, including waiting their turn at the end of the line for collocation space. Moreover, the Commission should clarify that the ILEC affiliates will not have any priority over already existing CLECs in that process.

Requiring ILEC affiliates to function as CLECs is the only way that the Commission can ensure that ILECs, through their advanced services affiliates, offer services "on the same footing as any of their competitors," and provide ILECs with sufficient incentive to stop subjecting CLECs to unfair and disparate treatment, as well as anticompetitive pricing practices, such as price squeezes.¹⁶ NPRM ¶ 86.

The effect of the Commission's rules on separation must be that the ILEC affiliate be a CLEC. It must obtain state certification through the same process as any other CLEC. It must

¹⁵ See Letter from Teleport Communications Group, to William Kennard, Chairman, Federal Communications Commission, CC Docket No. 98-11 (January 26, 1998) at 1 (citing unreasonable UNE prices).

¹⁶ Even while subject to 251(c)(3) obligations ILECs have attempted to deploy advanced services while engaging in anticompetitive pricing practices. In separate, but related proceedings, the Commission is currently addressing the concern of CLECs that several ILECs have federally tariffed their ADSL services at retail rates that are well below the ILECs' combined charges for the UNEs and collocation needed to provide those services. BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476, Direct Case of BellSouth, CC Docket No. 98-161 (filed Sept. 11, 1998); GTE Telephone Operating Companies GTOC Tariff FCC No. 1 GTOC Transmittal No. 1148, Direct Case of GTE, CC Docket No. 98-79 (filed Sept. 8, 1998); SBC Communications, Inc. for Pacific Bell Telephone Company Pacific Bell Tariff FCC No. 128, Pacific Transmittal No. 1986, Direct Case of Pacific Bell, CC Docket No. 98-103 (filed Sept. 11, 1998).

negotiate an interconnection agreement that is then available to all CLECs. It must apply for collocation subject to the same waiting periods, and must “get in line” like any other CLEC for available space. The affiliate must obtain loops subject to the same limitations as any other CLEC.

A. The Commission must ensure that ILECs and their Affiliates Remain Structurally and Functionally Separate

There are two central questions that the Commission must address as it crafts the affiliate option: 1) How should the commission ensure that in identity and structure an ILEC’s separate affiliate is “truly separate”; and 2) How can the Commission ensure that an ILEC’s treatment of its affiliates is impartial, and that in practice an affiliate does not behave like an “assign” of the ILEC.

1. ILECs and Affiliates Must Remain Structurally Separate

The Commission first addresses the issue of structural separation. In doing so, the Commission lists seven separation requirements that would enable an affiliate to qualify for non-incumbent LEC status. NPRM ¶ 96. Rhythms agrees with the Commission that these seven requirements are necessary to ensure a structural separation between an ILEC and its advanced services affiliate. Moreover, Rhythms agrees that these structural separations should apply to all ILEC affiliates, regardless of the size of the associated incumbent LEC. NPRM ¶ 98. In particular, Rhythms would like to highlight several of these structural separations.

First, ILECs must operate independently of their affiliates. This means ILECs and their affiliates may not “jointly own switching facilities or the land and buildings on which such facilities are located,” nor may the ILEC perform operating, installation, or maintenance functions for the affiliate. NPRM ¶ 96. Rhythms believes that the Commission should stress and elaborate

on the requirement to “operate independently.”¹⁷ As discussed infra Section IV, the ILEC must function like a CLEC, and this requirement to operate independently means that the advanced services affiliate must acquire its own equipment and collocate its own equipment in the same manner as other CLECs and without preferential treatment.

Second, to the extent that there are any transactions between an ILEC and its affiliate, those transactions must occur on an “arm’s length basis.” Id. To ensure this principle, the Commission has proposed, and Rhythms agrees, that the affiliates must provide a “detailed written description” of “any asset or service transferred and the terms and conditions of the transaction on the Internet,” and that description must be available within ten days of the transaction. Id. Rhythms also agrees with the Commission that all of these transactions should have to comply with the Commissions’ affiliate transaction rules. Id., (citing Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, 11 FCC Rcd 17539, 17593 (1996)).

In addition, the Commission should ensure that crucial information is included in these “detailed” descriptions, as they will give CLECs another opportunity to determine whether they are receiving the same treatment as CLECs, which is also a structural separation requirement.¹⁸ For instance, the incumbent’s descriptions should include details of the nature of equipment that

¹⁷ OSS—like all dimensions of CLEC/ILEC transactions—will no doubt improve dramatically, and at an accelerated rate, once the ILECs’ affiliates are forced to use it. See Application for Review of AT&T, In The Matter Of GTE Telephone Operating Companies GTOC Tariff F.C.C. No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79 (September 19, 1998) at 3.

¹⁸ Instead of expanding collocation cages to other available spaces, ILECs have limited collocation to small areas, and then have alleged that insufficient collocation space is available.

affiliates receive, such as physical makeup of the loops, and whether they have been cleansed of load coils and bridge loops.¹⁹

2. The Commission Should Not Eviscerate the Affiliate Option with De Minimis Exceptions

In addition to proposing structural separation requirements, the Commission also addresses transfers of assets between the incumbent and its affiliate. In particular, the Commission determined that the transfers may not be such that the affiliate becomes a successor or assign of the incumbent ILEC. “In order not to be subject to the requirements of section 251(c), the advanced services affiliate must not be a successor or assign of the incumbent ILEC.” NPRM ¶ 104. While a determination as to whether or not an affiliate is a successor or assign is a fact-based inquiry, there are transfers that will always render an affiliate an assign. As the Commission suggests, the most clear indication that an affiliate is in fact an assign would be a direct transfer from the incumbent to the affiliate UNEs that must be provided by the ILEC on an unbundled basis subject to 251(c)(3) of the Act. *Id.* Further, a wholesale transfer of facilities used to provide advanced services from an incumbent would also constitute an assignment. Rhythms agrees with these determinations, but has serious concerns about the Commission’s proposed de minimis exceptions under which ILECs can transfer equipment to an affiliate without making the affiliate an “assign” of the ILEC. These de minimis exceptions are expansive and create a gaping hole in the protective fabric of the affiliate option.

The Commission has indicated that a de minimis exception would apply to the transfer of facilities used specifically to provide advanced services, such as DSLAMs, packet switches, and transport facilities, owned by the incumbent ILEC up to 6 months after the date of the NPRM. *Id.*

¹⁹ Also mentioned, but not discussed are the following requirements: Third, the ILEC and its affiliate must maintain separate books, records, and accounts. Fourth, the ILEC and the affiliate must have separate officers, di-
(Footnote continued on next page)

¶ 109. Moreover, the Commission has proposed to allow these transfers to take place without being subject to the non-discrimination requirement of the Act. *Id.* ¶ 111. ILECs cannot just take their equipment and services, place a new title of ownership on those facilities, and simply state that they are now providing xDSL services through an unregulated affiliate. If an affiliate wants to utilize the xDSL equipment of an ILEC in providing advanced services, that affiliate must purchase that equipment from the ILEC at a reasonable market rate.

The Commission has asked whether or not ILECs should be able to house, for affiliates, equipment that is transferred from ILECs to affiliates. *Id.* ¶ 51. Rhythms emphatically opposes this de minimis exception. Throughout interconnection negotiations, the ILECs have used space constraints as one of the primary tactics of resistance against entering CLECs. Those same ILECs cannot now say that they have sufficient space to house the equipment of affiliates, while all along they have adamantly argued that there was absolutely insufficient space for CLEC collocation to occur.²⁰ In fact, affiliates should not be able to access space on the ILECs' premises until after the ILECs have met the CLECs' collocation requests previously denied on the basis of space constraints.

rectors and employees.

²⁰ Instead of expanding collocation cages to other available spaces, ILECs have limited collocation to small areas, and then have alleged that insufficient collocation space is available.